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IN THE
COURT OF APPEALS OF INDIANA

DAVID J. WIERENGA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1101-CR-159
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-9801-CF-5

November 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

David J. Wierenga, Jr. appeals his twenty-year sentence for Class C felony auto theft and habitual offender status. He contends that the trial court abused its discretion in weighing aggravating and mitigating factors and also that his sentence is inappropriate in light of the nature of the offenses and his character. Because we determine that Wierenga has failed to persuade us that the trial court abused its discretion or that his sentence is inappropriate in light of the nature of the offense and his character, we affirm.

Facts and Procedural History

On December 22, 1997, Wierenga was on probation for Class D felony auto theft. He was under the influence of alcohol and marijuana when he was leaving a Purdue University game and saw a vehicle that the owner had left running. Wierenga took the vehicle and used it to leave the game, returning it later with minimal damage. The State charged Wierenga with one count of Class D felony auto theft, two counts of Class C felony auto theft, and habitual offender status.

On June 10, 1998, Wierenga pled guilty to one count of Class C felony auto theft and habitual offender status as part of a plea agreement. The agreement provided that Wierenga was to pay restitution and that the trial court could impose "whatever sentence it deem[ed] appropriate" as long as the executed portion did not exceed fourteen years. Appellant's App. p. 183. The agreement also dismissed the two remaining counts. *Id.*

On August 25, 1998, the trial court conducted a sentencing hearing. The court found as aggravating factors that Wierenga had a substance abuse problem and had not sought out treatment, he had an extensive criminal history, he violated his probation by

committing this offense, he was in need of correctional or rehabilitative treatment best provided by commitment to a penal facility, and prior attempts at rehabilitation had been unsuccessful. *Id.* at 156. The court found as mitigating factors that incarceration would create an undue hardship on Wierenga's daughter, Wierenga had obtained his GED, he was an employee with special skills, and he had showed a willingness to address his alcohol problems while in prison. Sent. Tr. p. 6, 8, 14. The trial court determined that the aggravating factors outweighed the mitigating factors and sentenced Wierenga to eight years for Class C felony auto theft with a twelve-year enhancement for habitual offender status. The trial court suspended six years of the Class C felony auto theft sentence to supervised probation, resulting in an executed sentence of fourteen years. Wierenga was also ordered to pay $63.25 of restitution to the car owner and $255 to the car owner's insurance company, for a total amount of $318.25.

On April 3, 2002, Wierenga filed a petition to modify his sentence, which was granted. Wierenga was released from incarceration on August 15, 2002, and placed on supervised probation for three years and unsupervised probation for three years. The first year of his probation was to be spent on house arrest, and he was ordered to complete the Wabash Valley Program.

Wierenga's probation was revoked on August 8, 2005, when the trial court found that he violated his probation "by being expelled from the Forensic Diversion Program and by absconding from the State of Indiana." Appellant's App. p. 109. Wierenga was

ordered back to the Indiana Department of Correction for the remainder of his twenty-year sentence, which consisted of twelve years and twenty-two days.[1]

On September 7, 2010, Wierenga filed a Verified Motion for Permission to File a Belated Notice of Appeal. The trial court conducted a hearing and granted the motion on January 5, 2011. *Id.* at 24-31. Wierenga now appeals, challenging his initial sentence.

Discussion and Decision

Wierenga contends that the trial court abused its discretion in weighing aggravating and mitigating factors in determining his sentence for Class C felony auto theft and habitual offender status. Wierenga also contends that his twenty-year sentence is inappropriate in light of the nature of the offenses and his character. We disagree.[2]

I. Aggravating and Mitigating Factors

When Wierenga was initially sentenced in 1998, Indiana followed a different felony sentencing system than the one currently in place. An individual convicted of a felony was sentenced to a fixed term, with the possibility of years added or subtracted based on aggravating and mitigating circumstances. If the trial court used aggravating or mitigating circumstances to depart from the presumptive sentence, it had to identify all of the factors, state the reason why each factor was aggravating or mitigating, and articulate the balancing of those circumstances in arriving at its sentencing decision. *Donnegan v. State*, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004), *trans. denied*.

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[1] Wierenga claims the trial court erred by imposing his original suspended sentence rather than his modified sentence. He concedes that this issue is not before us as we are reviewing only his original sentence, but invites us to do so. We decline as the probation revocation sentence is not before us.

[2] Because we resolve this case as we do, there is no reason to reach the mootness issue raised by the State.

A. Aggravating Factors

The trial court found as aggravating factors that Wierenga had a substance abuse problem and had not sought out treatment, he had an "adult history of criminal activity, . . . the defendant has recently violated the conditions of his probation, the defendant is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility, and prior attempts at rehabilitation have been unsuccessful." Sent. Tr. p. 14; Appellant's App. p. 156. Wierenga contends that the trial court erred when it considered his criminal history of five previous felony convictions, his violation of probation, the fact that rehabilitative treatment could best be provided by his commitment in a penal facility, and that prior attempts at rehabilitation had been unsuccessful as separate aggravating factors. He argues that those four factors sprung from his criminal history, and so it was improper for the trial court to consider them as separate aggravating factors. *See Williams v. State*, 838 N.E.2d 1019, 1021 (Ind. 2005).

We first note, however, that Wierenga's probation violation is an appropriate aggravating factor independent from his criminal history. *Brown v. State*, 830 N.E.2d 956, 970-71 (Ind. Ct. App. 2005). Additionally, Wierenga is correct that *Williams* prevents the trial court from considering separate factors, such as likelihood to reoffend and need for rehabilitation, springing from the single source of an individual's criminal history as separate aggravators. 838 N.E.2d at 1021. However, under *Williams*, the trial court is permitted to give greater weight to Wierenga's criminal history as a whole due to the fact there are multiple factors that spring from it. *Id.* As a result, we are confident that the trial court would have come to the same conclusion in enhancing Wierenga's

sentence whether they considered his extensive criminal history, need for rehabilitative treatment best provided by commitment to a penal facility, and the fact that prior attempts at rehabilitation had been unsuccessful as separate aggravating factors or one substantial aggravator.

The trial court also properly considered Wierenga's history of substance abuse as an aggravator. Indiana law allows substance abuse to be considered an aggravating factor during sentencing. *See Iddings v. State*, 772 N.E.2d 1006, 1008 (Ind. Ct. App. 2002), *trans. denied*. Further, it is clear that the trial court was indicating that it hoped that Wierenga would have addressed his alcohol problem before he broke the law and was incarcerated; it was not, as Wierenga argues, ignoring the fact that he was going to substance abuse classes while he was actually incarcerated. Sent. Tr. p. 6.

While the rest of the aggravating factors were appropriate to consider, the trial court did err in considering the fact that Wierenga had not paid restitution before the sentencing hearing. An order of restitution is "a form of punishment, and therefore is as much a part of the criminal sentence as a fine or other penalty." *McKenney v. State*, 848 N.E.2d 1127, 1129 (Ind. Ct. App. 2006). Since the restitution order was part of his sentence, the trial court could not logically consider Wierenga's failure to pay restitution before being sentenced as an aggravating factor because the order itself had not yet been put into effect. This was an inappropriate aggravating factor.

However, despite the fact that the trial court erroneously considered this as an aggravating factor, "a sentence enhancement may still be upheld when a trial court improperly applies an aggravator but other valid aggravators exist." *Anglin v. State*, 787

N.E.2d 1012, 1018 (Ind. Ct. App. 2003), *trans. denied*. There are multiple valid aggravators that the trial court correctly considered: Wierenga's substance abuse problem, his extensive criminal history, and his violation of probation. We are confident that the trial court would have reached the same conclusion regarding Wierenga's sentence even had it not considered this inappropriate aggravating factor of lack of restitution payment in its decision.

B. Mitigating Factors

Despite Wierenga's contention, the trial court did not err in failing to consider his guilty plea as a mitigating factor. While it is true that Indiana gives some mitigating weight to a guilty plea, *McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007), the significance of that plea varies from case to case. *Francis v. State*, 817 N.E.2d 235, 238 n.3 (Ind. 2004). A defendant's guilty plea "may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, . . . or when the defendant receives a substantial benefit in return for the plea." *Anglemyer v. State*, 875 N.E.2d 218, 221 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007) (citing *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)).

In this case, Wierenga received a substantial benefit in pleading guilty—his executed sentence was reduced from a possible twenty years down to no more than fourteen years executed. Reducing his possible executed sentence by six years gave Wierenga an advantage in pleading guilty, so it was not erroneous for the trial court to fail to consider his plea as a mitigating factor.

The trial court was correct, however, in finding as mitigating factors that incarceration would create an undue hardship on Wierenga's daughter, Wierenga had obtained his GED, he was an employee with special skills, and he had showed a willingness to address his alcohol problems while in prison. Sent. Tr. p. 6, 8, 14. The trial court also did not abuse its discretion in weighing the relevant mitigating and aggravating factors in determining Wierenga's sentence.

II. Inappropriate Sentence

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

At the time of Wierenga's offense, the presumptive sentence for a Class C felony was four years, with no more than four years added for aggravating circumstances and no more than two years subtracted for mitigating circumstances. Ind. Code Ann. § 35-50-2-6 (West 1998). The habitual offender statute provided an enhancement of one to three times the presumptive sentence of the underlying felony. Ind. Code Ann. § 35-50-2-8 (West 1998). After considering the aggravating and mitigating factors, the trial court

sentenced Wierenga to eight years for Class C felony auto theft and an enhancement of twelve years for habitual offender status, three times the presumptive sentence for a Class C felony. Both of these sentences were within the statutory range.

Regarding the nature of the offense, Wierenga had been drinking and smoking marijuana before he made the decision to steal a car while on probation for the same felony offense. While this was not a premeditated crime and there was not extensive property damage done, this was Wierenga's third felony auto theft conviction. Also, given the intoxicated condition that Wierenga was in when he stole the vehicle, this was not merely a "run of the mill" offense. As the deputy prosecutor noted at the sentencing hearing, "when you're drunk and stealing a car and driving it, it becomes a crime that shows a reckless – it is a reckless endangerment to the health and safety of other people physically." Sent. Tr. p. 13. The nature of the offense was therefore serious.

Regarding Wierenga's character, he has an extensive criminal history. He had previously been convicted of felony theft, auto theft, forgery and operating while intoxicated, and he was on probation when he committed this offense. Appellant's App. p. 188. His recidivism shows that he was not deterred from criminal activity through his previous contact with the criminal justice system. Also, Wierenga had a substantial history of substance abuse and committed the present crime while he was under the influence of alcohol and marijuana. Sent. Tr. p. 7. He also had a daughter to support and a GED and skills as a welder, but he chose to continue down a path of criminal activity.

After due consideration of the trial court's decision, we cannot say that Wierenga's twenty-year sentence with six years suspended is inappropriate in light of the nature of the offense and his character.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.